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THE NLRB AND THE UNIT CLARIFICATION PETITION

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In January 1968, in a case involving the Libbey-Owens-Ford Company,[1] three members of the National Labor Relations Board, over the bitter dissent of the other two Board members, converted a hitherto little known procedure termed "unit clarification" into a mechanism which permits unions to expand the scope of multiplant bargaining, regardless of employer opposition and without adequate examination of the employees' alternate desires. This Board action is now beginning to generate a series of union attempts to gain expanded bargaining units that they have been unable to win through collective bargaining. It threatens to broaden considerably the area of industrial dispute.

After a brief discussion of the sources of NLRB authority, this Article examines the history, role, and use of the unit clarification procedure and contrasts this role and use with the NLRB's recent decision in *Libbey-Owens-Ford*. The final section studies the implications of the NRLB's abrupt departure from past practice.

I. THE SOURCES AND LIMITS OF NLRB AUTHORITY

Section 1 of the National Labor Relations Act (NLRA) [2] states that the national policy is "to eliminate the causes of certain substantial

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[1] Libbey-Owens-Ford Glass Co., 169 N.L.R.B. No. 2, 1968-1 CCH NLRB Dec. 29,001 (Jan. 12, 1968).

[2] National Labor Relations Act § 1, 29 U.S.C. § 151 (1964).

obstructions to the free flow of commerce . . . by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing . . . ." The task of implementing this policy was assigned to the National Labor Relations Board.[3] The Act also provides the Board with a policy, statutory mandates, and considerable, although limited, discretion. As the Supreme Court noted: "When Congress passes an Act empowering administrative agencies to carry on governmental activities, the power of those agencies is circumscribed by the authority granted."[4] Section 9 of the Act gives the NLRB the duty and authority first to determine the appropriate unit for collective bargaining and then to conduct an election within this unit to decide which union, if any, shall represent the employees.[5] Section 9(b) provides in part that:

> The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit or subdivision thereof . . . .[6]

Subsection (b) goes on to restrict the Board's authority in cases involving craft units and units involving employees who are professionals and those who are guards.

One of the most controversial restrictions on unit determinations is found in section 9(c)(5) of the Act.[7] Under this mandate the Board is prohibited from using the extent to which employees have been organized as a controlling factor in setting the size of the unit. Although it is undeniable that this clause limits the authority granted in subsection (b), there has been great controversy over whether section 9(c)(1) also restricts subsection (b). Section 9(c)(1) provides that:

> Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board . . . the Board shall investigate such petition and if it has reasonable cause to believe that a *question of representation* affecting commerce exists shall provide for an appropriate hearing upon due notice. . . . *If the Board finds upon the record of such hearing that such a question of representation exists,* it shall direct an election by secret ballot and shall certify the results thereof.[8]

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[3] 29 U.S.C. § 160 (1964).

[4] Stark v. Wickard, 321 U.S. 288, 309 (1944).

[5] 29 U.S.C. § 159 (1964).

[6] 29 U.S.C. § 159(b) (1964).

[7] 29 U.S.C. § 159(c)(5) (1964).

[8] 29 U.S.C. § 159(c)(1) (1964) (emphasis added).

The disagreement revolves around the issue whether a "question of representation" must exist before the Board can exercise the authority granted under section 9(b). The General Counsel of the NLRB has argued that the Board has been given "a general grant of authority . . . to determine appropriate bargaining units—an authority bounded [only] by several express, limiting provisions." [9] However, the opposing viewpoints maintain that subsection (b) does not exist in a vacuum and therefore section 9 must be read in its entirety.[10] Considered in the context of the entire section, the words "in each case" found in subsection (b), might refer to the representation cases discussed in subsection (c). Furthermore, since 9(c)(5) admittedly restricts subsection (b), then it logically follows that section 9(c)(1) can also be read as a restriction. The NLRB has never accepted this interpretation, but has developed techniques to clarify ambiguities even where no question of representation exists.

Because changes in circumstances might dictate changes in a continuing employer-employee relationship, the Board has stated that unit determinations, made at the first step in the collective bargaining process, are not immutable. Accordingly, a procedure—appropriately entitled "unit clarification"—has been provided whereby disputes over the delineation of an existing unit may be resolved.

It is certainly not contended here that the intended use of the clarification petition is in any way improper. It is, however, the thesis of this Article that the National Labor Relations Board has recently abused the clarification petition's intended use by utilizing it as a mechanism to merge existing bargaining units. It is contended further that the strict mandate of section 9(c)(1), requiring the presence of a question of representation before the secret ballot election may be used, has been circumvented.[11] An examination of the traditional uses of the unit clarification procedure and then of the *Libbey-Owens-Ford* case should serve to confirm this analysis.

II. History of the Unit Clarification Petition

The dynamics of any employment relationship dictate that the adjudicator of this relationship must be provided with a certain degree of flexibility. The Congress of the United States recognized this need

[9] Brief for Appellant at 8, McCulloch v. Libbey-Owens-Ford Glass Co., 403 F.2d 916 (D.C. Cir. 1968).

[10] Brief for Employer at 39-40, PPG Industries, Inc., No. 6-UC-8 (N.L.R.B., filed Dec. 9, 1966).

[11] *See also* A. McFarland & W. Bishop, Union Authorization Cards and the NLRB (U. Pa. Labor Relations and Public Policy Series Rep. No. 2, 1969), in which it is argued that the NLRB has also circumvented the secret ballot election requirement by granting representation rights on the basis of authorization cards.

in the National Labor Relations Act. Section 10(d) of that Act provides:

> Until the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.[12]

Pursuant to the power granted in section 10(d), and the authority granted in section 9 of the Act, the NLRB enacted rule 102.60(b) of its Rules and Regulations.[13] It is therein provided that "[a] petition for clarification of an existing bargaining unit or a petition for amendment or certification,[14] in the absence of a question concerning representation, may be filed by a labor organization or by an employer." [15]

Referring again to rule 102.60(b), it can be seen that neither the unit clarification nor the amendment of certification petition may be used where a "question concerning representation" exists. The Board has consistently held that where a question of representation is present, the petition for clarification must be dismissed and that the proper procedure is a petition seeking an election pursuant to section 9(c)

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[12] 29 U.S.C. § 160(d) (1964).

[13] 29 C.F.R. § 102.60(b) (1968). NLRB determinations in representation proceedings are not considered final orders within § 10 of the Act. Accordingly, such determinations are subject to judicial review only when they are incidental to a review of an unfair labor order. Because of this, § 10(d), which is applicable to unfair labor practice proceedings, can be considered as implicitly approving the concomitant power associated with § 9 of the Act. *See* Carey v. Westinghouse Elec. Co., 375 U.S. 261 (1964) in which the Supreme Court gave tacit approval to the Board's enactment of the Rule.

[14] Although the wording of the Rule appears to imply that the unit clarification petition and the amendment of certification may be used interchangeably, certain differences have evolved. From its inception, the amendment of certification was intended to be used only by a certified union, as evidenced by the petition form which requires the case number in which certification was granted. Prior to 1957, the NLRB had never questioned the propriety of an uncertified union using the motion to clarify (the name then used for the unit clarification petition). However, in Bell Telephone Co., 118 N.L.R.B. 371 (1957), the Board concluded that no "legal power" can be derived from the Act with regard to an uncertified union. Denied the benefits of Rule 102.60(b) as a result of this decision, an uncertified union was compelled to seek either certification or a settlement with the employer. The latter alternative, although promoted by the NLRA, was difficult because of the lack of consistent guidelines in previous NLRB decisions which could have served as a basis for agreement. Choosing the former would also present serious problems for the union. For example, a "question of representation" would have to be found to exist; such a determination and its related election leave other labor organizations free to compete for the right to exclusive representation of the bargaining unit—something the union would like to avoid.

In Brotherhood of Locomotive Firemen & Enginemen, 145 N.L.R.B. 1521 (1964), the NLRB reversed *Bell Telephone Co.* Although this decision left both certified and uncertified unions free to use the unit clarification petition, certified unions normally use the amendment of certification procedure, which is still denied to the uncertified union.

[15] *See also* 29 C.F.R. § 101.17 (1969).

of the Act.[16] The reason for the Board's rule that the unit clarification and amendment of certification petition may only be used in the absence of a question concerning representation is easily discernible. Section 9(c)(1) of the Act provides for a specific procedure where the Board determines that a question of representation does exist.[17] Absent such a determination neither the employer nor the union may file a representation petition.[18]

It is certainly obvious that a ruling concerning the presence or absence of a question relating to representation may well be determinative of the propriety of a particular procedure.[19] But the Act does not contain any comprehensive definition of what in fact constitutes such a question, although certain sections do provide some indication of the legislative intent. Section 9(c)(1)(A)(i), for example, provides for the filing of a petition by a labor organization which alleges that a substantial number of employees desire collective bargaining while their employer declines to recognize their representative. Based on this mandate, the Board has concluded that where the employer declines to recognize a union asserting representative status, *inter alia,* there is a question concerning representation.[20]

The question then is whether the inverse situation holds true. Does the absence of an employer's declination or refusal to recognize the petitioning union require a per se ruling that no question of representation exists? This issue was raised in the case of *General Box Co.*[21] The employer there resisted the union's representation petition on the grounds that it recognized the petitioner, and therefore no question of representation existed. The labor organization argued that because certified bargaining agents are given advantages and benefits which recognized unions do not enjoy, there exists a representation question.

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16 *See* News Syndicate Co., 164 N.L.R.B. No. 69, 1967 CCH NLRB Dec. 27,780 (1967); Howmet Corp., 162 N.L.R.B. No. 143, 1967 CCH NLRB Dec. 27,403 (1967); Standard Oil Co., 146 N.L.R.B. 1189 (1964); General Elec. Co., 144 N.L.R.B. 88 (1963); Dayton Power & Light Co., 137 N.L.R.B. 337 (1962).

17 *See* American Stores Co., 130 N.L.R.B. 678 (1961).

18 The "certification of representative" petition and the "representation" petition both constitute the proper procedure for requesting a § 9(c)(1) election. The distinction is that the former is used by a labor organization while the latter is filed by the petitioning employer.

19 While a question concerning representation must be present to maintain a representation petition, the Board will, sua sponte, convert the petition to a unit clarification petition when necessary. See Coca-Cola Bottling Co., 133 N.L.R.B. 762 (1961).

20 "The Board initially considers in [representation] proceedings whether or not a question concerning representation has arisen, and generally finds that it is the case if the employer has refused to recognize a union seeking to bargain collectively for employees in a given unit." 10 NLRB ANN. REP. 16 (1945).

21 82 N.L.R.B. 678 (1949).

The Board concluded that "an employer's recognition of a union which asserts representative status does not, in and of itself, negate the existence of a question concerning representations." [22] The Board then determined that, in this case, there were sufficient facts to constitute a representation question. First, the petitioner asserted a majority standing; second, it expressed a desire to secure a certificate; and finally, it filed a formal petition asking for an election.[23]

One need not be an expert in labor law to realize that the facts found to be sufficient in that case are common in every case in which a petition is filed under section 9(c)(1). Moreover, the Board's third statement is circular. The Board reasons that in order to file a representation petition, a question concerning representation must exist. However, the mere filing of such a petition tends to create a representation question. Thus, despite the employer's voluntary recognition, an uncertified union may successfully file a petition under section 9(c)(1). The deterrent to a union filing such a petition is that it allows outside organizations to compete for bargaining rights. On the other hand, a representation proceeding affords the employees the greatest freedom of choice, which is not true of the unit clarification petition. Moreover, as will be pointed out below, the unit clarification procedure can be used to extend union power at the expense of both the employees and the employer without full recognition of the rights of either of the latter.

III. Traditional Uses of the Unit Clarification Petition

Unit clarification has been used in two general areas: cases involving a new or uncertain job classification and cases in which the petitioning party alleges that expanded operations constitute an accretion to the existing bargaining unit. The Board itself has stated that:

> Clarification of a certification or amendment of a unit description may be in order where a new employee classification has been created, or an employer's operations have been expanded subsequent to a certification, and the employees involved are normal accretions to the certified unit.[24]

A. *Dispute Over Job Classifications*

1. Traditional Dispute

Westinghouse Electric Corporation [25] illustrates the use of the unit clarification petition where the parties are in conflict over job classifi-

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[22] *Id.* at 682.

[23] *Id.* at 682-83.

[24] Standard Oil Co. (Ohio), 146 N.L.R.B. 1189, 1191 (1964).

[25] 142 N.L.R.B. 317 (1963). *See also* Boston Gas Co., 136 N.L.R.B. 219 (1962), which involves the identical problem.

cations. The union's certification covered all employees with the exception of the specific exclusion of "manufacturing engineers." During the period of a collective bargaining agreement, Westinghouse employed certain personnel whom they classified as manufacturing engineers. In their unit clarification petition the labor organization alleged that despite the employer's classification the new employees were part of the bargaining unit. The Board ruled that the disputed employees performed duties that were typical of manufacturing engineers. Since these employees historically were excluded from the bargaining unit, the Board dismissed the petition.

2. Altered Employment Status and the Employer's Dilemma

Another situation in which the clarification petition has been used extensively is that in which an employer transfers employees into and out of the bargaining unit. If management were given unfettered discretion to transfer employees out of an existing bargaining unit, the effectiveness of collective bargaining would, of course, be greatly diminished. Decreasing the size of the unit might sharply decrease the bargaining power of the union. On the other hand, restricting a firm's right to move employees could prove an imposing barrier to an efficient and economic allocation of resources. The clarification procedure provides a means for the Board to balance these conflicting interests. In reaching a decision concerning the merits of the unit clarification petition, the Board examines the nature of the new employment and the potential effects of the transfer.[26] A similar consideration has been used to resolve disputes concerning the status of summer employees.[27]

Where a firm's employees are organized in two or more bargaining units represented by different labor organizations, a movement of personnel between units may create union rivalry and disrupt the company's production. The NLRB was confronted with this problem in *Libby, McNeill & Libby*.[28] The Packinghouse Workers represented all packinghouse employees, while the United Steelworkers were certified to represent manufacturing employees located in an adjoining plant. For business reasons, the employer transferred depalletizing machiners from the manufacturing plant to the canning plant. The Steelworkers claimed a continuing right to represent the transferred employees, since the move did not change the true nature of the employment. Simultaneously, the Packinghouse Workers claimed representa-

[26] *See, e.g.*, Formica Corp., 142 N.L.R.B. 433 (1963).

[27] B. J. Carney Co., 157 N.L.R.B. 1285 (1966).

[28] 159 N.L.R.B. 677 (1966).

tion rights because the new employees constituted an accretion to its bargaining unit. By accepting either argument the employer would have immediately subjected himself to an unfair labor practice charge based on section 8(a)(5) of the NLRA.[29] The Board resolved this tripartite conflict by an adjudication based on the clarification petitions filed by all parties.

In situations such as that in the *Libby* case, the employer finds himself in a precarious position. If, for example, the company were to have continued bargaining with the losing party over the transferred employees, the NLRB would have found it guilty of an unfair labor practice. Such a result is a high price to charge the employer for making what, even in retrospect, would have been a reasonable decision. An optimal solution would be to have the involved parties examine prior Board decisions and thereby determine who should properly represent the disputed employees. Such a solution would certainly yield large savings in both time and money. Furthermore, the parties would be able to reach a compromise without outside intervention—a legislative policy clearly endorsed by the Act. Unfortunately, inconsistencies in NLRB decisions could well prevent any successful implementation of this solution. Even the most astute students of industrial relations are strained to reconcile many Board decisions.[30] Since the parties are understandably reluctant to "gamble," they must resort to the most expedient Board procedure—the unit clarification petition.

B. *Traditional Problems of Jurisdiction in Job Classification Disputes*

A question raised in conjunction with job classification cases concerns the jurisdiction of the National Labor Relations Board. Jurisdiction depends upon the nature of the controversy. If the controversy is whether certain work should be performed by workers in one bargaining unit or those in another, then section 8(b)(4)(D) of the NLRA is applicable. This section provides that where there is controversy over work assignments, the Board may only act when there is a strike or the threat of a strike. On the other hand, where the controversy involves which union should represent the employees doing a certain type of work, section 9 is applicable, and the unit clarification petition may be utilized.

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[29] Section 8(a)(5) of the National Labor Relations Act makes it an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees, "subject to the provisions of Section 9(a)." This latter section states that the designated representative shall be the exclusive representative for all employees in the bargaining unit.

[30] For an illustration of inconsistent NLRB decisions, see Comment, 47 B.U. L. REV. 139 (1967).

This jurisdictional problem was confronted by the Supreme Court in *Carey v. Westinghouse Electric Corp.*[31] The International Union of Electrical, Radio and Machine Workers (IUE) was the exclusive representative for the production and maintenance employees at one of Westinghouse's plants. Another union, the Federation of Independent Westinghouse Salaried Unions, represented all salaried and technical workers at the same plant, excluding all plant and maintenance personnel. The IUE filed a grievance under the collective bargaining agreement alleging that certain employees now represented by the Federation were doing plant and maintenance work. Westinghouse contended that the controversy was a representation question and within the jurisdiction of the NLRB and refused to arbitrate. Subsequently, the IUE petitioned a New York supreme court for an injunction against the employer, which was subsequently denied.[32] On certiorari, the United States Supreme Court reversed the New York courts and granted IUE's request. After making the fine distinction between work assignment controversies and representation issues, the Court stated that "the Board clarifies certificates where a certified union seeks to represent additional employees; but it will not entertain a motion to clarify a certificate where the union merely seeks additional work for employees already within its unit." [33] The Court was also forced to decide whether the state court had jurisdiction. It concluded that a state court or an arbitrator may entertain jurisdiction regardless of the nature of the controversy—work assignment or representation—since there was no danger that they could usurp the power of the NLRB, when "[t]he superior authority of the Board may be invoked at any time." [33a]

Justice Hugo Black, dissenting with Justice Clark, reasoned that requiring arbitration ex parte for the Federation is offensive to due process because the arbitrator's award—although not binding on Board or court—is in the words of the majority "persuasive." Second, the employer could be sued under section 301 of the Taft-Hartley Act [34] in either state or federal court for an alleged contract violation arising out of his failure to bargain with the right union. The employer must guess which of his employees he will be instructed to assign to the jobs by an arbitrator, the Board, or a court. Objecting to a penalty for predictive error, Justice Black commented:

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[31] 375 U.S. 261 (1964).

[32] 15 App. Div. 2d 7, 221 N.Y.S.2d 303 (1961) (affirming and modifying unreported Special Term decision), *aff'd* 11 N.Y.2d 452, 184 N.E.2d 298, 230 N.Y.S.2d 703 (1962), *rev'd* 375 U.S. 261 (1964).

[33] 375 U.S. at 268-69.

[33a] *Id.* at 272.

[34] 29 U.S.C. § 185 (1964).

> If he happens to guess wrong, he is liable to be mulcted in damages. . . . The Court's holding, thus subjecting an employer to damages when he has done nothing wrong, seems to me contrary to the National Labor Relations Act as well as to the principles of common everyday justice.[35]

As a result of the majority's decision in *Carey*, the IUE's grievance petition went to an arbitrator who decided to split the representation rights between the two labor organizations. Dissatisfied with this award, the employer filed a unit clarification petition before the Board, which granted exclusive representation rights to the Federation concluding that the arbitrator's award was ineffective because all of the parties involved were not represented in the proceeding, and also because there were two contracts involved. Thus, four years after the Supreme Court's decision the controversy in *Carey* was finally settled.[36]

McDonnell Company, [37] a recent case in which the Board was again confronted with the conflict between a work assignment issue and a representation issue, further illustrates the adverse effects of the decision in *Carey*. The International Brotherhood of Electrical Workers (IBEW) represented the construction and maintenance employees, while the International Association of Machinists and Aerospace Workers represented production personnel. Both organizations claimed representation rights for certain "circuit analyzers." Early in 1965, the Machinists initiated and emerged victorious in arbitration proceedings from which the IBEW was excluded. Subsequently, the IBEW received an award in a separate arbitration proceeding in which the Machinists did not participate.

When the IBEW sued to enforce their arbitration award and to declare the earlier arbitrator's award null and void, the Machinists intervened and requested enforcement of the award favoring them. Victimized by this jurisdictional dispute, the employer filed a unit clarification petition, and the district court granted a stay of all proceedings pending disposition of the Board hearing.

Based on *Carey*, the majority of the Board reasoned that the dispute involved a representation and not a work assignment issue. The two dissenting members, who would have dismissed the clarification proceeding as involving a work assignment issue, also based their decision on *Carey*. It took almost four years, two arbitrators, a federal

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[35] 375 U.S. at 275.

[36] Westinghouse Elec. Corp., 162 N.L.R.B. 768, 1967 CCH NLRB Dec. 27,247 (1967).

[37] McDonnell Co., 163 N.L.R.B. No. 31, 1968-2 CCH NLRB Dec. 25,413 (1968); *see* ABC, 112 N.L.R.B. 605 (1956).

district court and the National Labor Relations Board to settle a simple bargaining unit clarification. Given the lack of NLRB guidelines, the unit clarification petition eventually proved to be the best solution.

C. *The Accretion Issue*

Cases in which there has been an increase in the level of employment compose another area in which the unit clarification procedure has traditionally been utilized. A typical increase might be caused by an expansion in the employer's labor force or by the acquisition of another plant through purchase or merger. In situations such as these the NLRB must determine whether the addition is an accretion to the existing bargaining unit or a new grouping of employees which requires a representation election under section 9(c)(1).

Such a determination is vital to the employer, the labor organization, and the employees. Where, for example, there is a mere addition of a department to a single store, a finding of a new unit would require an election that would harvest all the typical pressures of union elections. Management would also face the possibility of work stoppages and boycotts from more than one union, and the difficulty of bargaining with several unions representing employees with the same community of interest. On the other hand, a determination that an entirely distinct group of employees exists, having separate duties, functions, and interests, is an accretion to the existing unit which would require the company to fit a new factual situation into an existing bargaining structure and to incorporate contract provisions based on policies that were developed without consideration of the later addition. Where two groups of employees do not share a community of interests, separate elections must be provided in order to assure the employees "the fullest freedom in exercising the rights guaranteed by [the] Act." [38] To do otherwise, would deny employees the right, supposedly guaranteed by the Act, to choose whether they wish to be represented and, if so, by whom.

When determining whether the disputed employees constitute an accretion the Board examines certain factors to ascertain whether a community of interests exists. Such factors include the history of the bargaining unit,[39] the geographic proximity or isolation of the new employees,[40] the functions, duties, and skills of the entire work force,[41] and the administrative territories or subdivisions of the em-

[38] National Labor Relations Act § 9(b), 29 U.S.C. § 159(b) (1964).

[39] Brockton Taunton Gas Co., 132 N.L.R.B. 940 (1961).

[40] Fox Co., 158 N.L.R.B. 320 (1966); Gas Serv. Co., 140 N.L.R.B. 445 (1963).

[41] Worthington Crop., 155 N.L.R.B. 222 (1965); Gas Serv. Co., 140 N.L.R.B. 445 (1963).

ployer.[42] In a recent case[43] that clearly illustrates the Board's use of these various factors, the International Brotherhood of Electrical Workers alleged in a unit clarification petition that certain salaried warehouse employees constituted an accretion in an existing unit. Before Westinghouse expanded its Hillside, New Jersey, operations by moving a warehouse there from Newark, the labor organization was the exclusive bargaining representative for all salaried workers in the employer's Hillside manufacturing and repair department. Finding that the warehouse department was physically separate from the manufacturing and repair department, and that the supervision and functions of the employees were distinct, the Board ruled that the petition for clarification was an improper procedure for resolving the issue, and held that representation rights could only be gained through a section 9(c)(1) election.[44]

An examination of a number of cases involving alleged accretions has shown that the NLRB has used these so-called "factors" inconsistently. Although each factor, taken by itself, can be the basis for a given result, if more weight is given to one factor than another, a different or inconsistent result may prevail. These inconsistencies have placed the employer in the unenviable position which Justice Black found objectionable in his dissent in *Carey*: that is, an employer who bargains with the wrong union commits an unfair labor practice and is liable for damages under section 301 of the Taft-Hartley Act, even if he has acted reasonably.[45] Such a holding certainly seems to contravene the policies of the NLRA and to violate any sense of justice and fairness.

While providing some relief, the unit clarification procedure should not be considered the "optimal" solution, due to the fact that it requires the intervention of an external agency in contravention of the national

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[42] Westinghouse Elec. Corp., 173 N.L.R.B. No. 51, 1968-2 CCH NLRB Dec. 25,437 (1968); Pacific States Steel Corp., 134 N.L.R.B. 1325 (1961).

[43] Westinghouse Elec. Corp., 173 N.L.R.B. No. 51, 1968-2 CCH NLRB Dec. 25,437 (1968). For a discussion of the NLRB's use of these factors, *see* Note, *The Board and Section 9(c)(5): Multi-Location and Single-Location Bargaining Units in the Insurance and Retail Industries*, 79 HARV. L. REV. 811 (1966).

[44] Whenever a unit clarification procedure alleges an accretion to an existing unit, the Board must examine substantive arguments to determine the propriety of the procedure. If these substantive arguments are rejected, the petition is dismissed, but this is not a finding for the respondent.

[45] In the case of NLRB v. Spartans Indus., Inc., 406 F.2d 1002 (5th Cir. 1969), the Fifth Circuit Court of Appeals enforced a Labor Board order holding the employer guilty of an unfair labor practice on the grounds that the company had recognized one of 2 contesting unions as the proper bargaining agent for employees at a new store. At the outset of the dispute the employer remained neutral and refrained from transferring old employees to the new store. However, because of pressing economic considerations, it became necessary to recognize one of the unions. The NLRB ruled that despite the economic realities of the situation and the reasonableness of the employer's decision, the granting of recognition constituted a violation of the Taft-Hartley Act.

policy of free collective bargaining. However, the recent decision of the Supreme Court in *Transportation-Communication Employees Union v. Union Pacific Railroad Co.*[46] provides the basis for a promising solution.

In 1952, the Union Pacific Railroad Company placed into operation a computer system which automatically performed the communications functions previously done by telegraphers represented by the Transportation-Communication Employees (T-C) Union. Operation of the computers was assigned to clerks represented by the Brotherhood of Railway Clerks. The T-C Union brought a claim to the National Railroad Adjustment Board that the computer work should be performed by the telegraphers. After the Brotherhood of Railway Clerks refused to participate, the Board found for the telegraphers. A petition for enforcement of the Board's award was filed in the federal district court, which dismissed the case, as the Supreme Court later noted, "on the ground that the clerk's union was an indispensable party, and that the telegraphers, though given the opportunity, refused to make it a party." [47] The court of appeals affirmed this decision [48] and the Supreme Court granted certiorari.

In an opinion written by Justice Black, who dissented with Justice Clark, in *Carey*, the Supreme Court affirmed the decisions of the lower courts and remanded the case to the Adjustment Board. Justice Black noted first that collective bargaining agreements, unlike ordinary contracts for the sale of goods or services, must be considered in conjunction with all other related collective bargaining agreements, as well as trade practice and custom. He then criticized the past practice of requiring two bilateral actions to resolve a trilateral problem. To correct this, the Court remanded the case to the Adjustment Board and directed it to give the Railway Clerks

> an opportunity to be heard, and, whether or not the clerks' union accepts this opportunity, to resolve this entire dispute upon consideration not only of the contracts between the railroad and the telegraphers, but "in light of . . . [contracts] between the railroad" and any other union "involved" in the overall dispute, and upon consideration of "evidence as to usage, practice and custom" pertinent to all these agreements. . . . The Board's order, based upon such thorough consideration after giving the clerk's union a chance to be heard, will then be enforceable by the courts.[49]

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[46] 385 U.S. 157 (1966).

[47] *Id.* at 159.

[48] Transportation-Comun. Union v. Union Pac. Ry., 349 F.2d 408 (10th Cir. 1965).

[49] 385 U.S. 157, 165-66 (1966) (citation omitted).

The effect of the ruling was to require the National Railroad Adjustment Board to resolve this trilateral dispute through a joinder process. The Board was required to consider the interests of all parties involved whether or not they participated.

Because the Court's decision in *Transportation-Communications Employees Union* was based on the Railway Labor Act, the decision would not necessarily be controlling in a case arising under the NLRA. However, an examination of the Court's opinion reveals an analysis couched in terms broad enough to be applied easily to all trilateral jurisdictional disputes. One proponent of this procedure has summarized it as follows:

> We may now anticipate the Court's ultimate sanctioning of an arbitral joinder procedure under which arbitrators (not courts) would be recognized to possess a first-instance procedural jurisdiction to deny the arbitrability of work-assignment grievances unless the grieving union shall also sanction inclusion in the hearing, as a 'party,' of any other union claimant. Refusal to join as a party in those circumstances, rejecting the correlative right thereafter to participate in designating another arbitrator before whom the issue may be heard on the merits, should foreclose the declining union from later reopening the issue before the Labor Board. Its day in court will have come and gone.[50]

Therefore, Justice Black's opinion provides a basis for resolving the problems created by *Carey* and by the NLRB's inconsistency. Unless it is followed in jurisdictional dispute cases arising under the NLRA, the employer must continue to utilize the unit clarification petition for relief.

IV. Abuses of the Unit Clarification Procedure

In many cases labor unions have attempted to use the unit clarification petition to sidestep the freedom of choice guaranteed to all employees by the National Labor Relations Act. Although unions presumably represent the best interests of employees, in many situations they have interests divergent from those of the workers they represent. Thus, by requesting a particular bargaining unit, "the union may be seeking not so much to vindicate employee interests as to sweep additional employees into its jurisdiction or, simply, to prevent a rival union from organizing a group of employees which it wants for itself." [51]

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[50] E. Jones, A Sequel in the Evolution of the Trilateral Arbitration of Jurisdictional Labor Disputes—The Supreme Court's Gift to Embattled Employers, 894-95 (U. Calif. Inst. of Indus. Relations Reprint No. 188 1968).

[51] Hall, *The Appropriate Bargaining Unit: Striking a Balance Between Stable Labor Relations and Employee Free Choice,* 18 W. Res. L. Rev. 479, 485 (1967).

During initial organization campaigns the union will usually petition for a bargaining unit composed only of groups that it feels it can successfully organize. Although the Act specifically prohibits using extent of organization as a controlling factor in unit determinations,[52] many of the country's leading labor authorities seriously question the NLRB's adherence to this statutory mandate.[53]

Once it acquires representation rights the union will continue to strive to enhance the size of the unit. The search for additional dues-paying members is often made at the expense of both rival unions and employee freedom. The unit clarification petition provides a strong weapon in the union's arsenal. Although a section 9(c)(1) representation election protects the employee's freedom of choice, it allows rival unions to challenge the incumbent union's right to be the exclusive representative, whereas the unit clarification petition permits the union to increase the size of the bargaining unit without giving the employees an opportunity to change or eliminate representatives.

The line between the use and abuse of this generally desirable procedure can be maintained only by an impartial National Labor Relations Board. Until recently, the Labor Board has drawn the line with care. For example, in *Gould National Batteries, Inc.*,[54] the Board preserved the rights guaranteed to unrepresented employees by the NLRA[55] when it dismissed a unit clarification petition which sought to combine one unit of 276 unionized employees with two units comprised of 117 unrepresented workers.

Another situation in which the unit clarification petition may be abused is where a technical accretion has occurred, but the union has long "slept on their rights." In one case, for example, the union had gained representation rights to all clerical employees.[56] Three years later a unit clarification petition was filed alleging that certain "coders"

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[52] "In determining whether a unit is appropriate for the purposes specified in subsection (b) the extent to which employees have organized shall not be controlling." 29 U.S.C. § 159(c)(5) (1964).

[53] One commentator has stated that:

> An examination of the cases that have dealt with contested bargaining unit questions supports the conclusion that the Board has a pronounced tendency to establish as appropriate whatever unit most reflects the extent of the union's organizational success, regardless of other considerations.

Rains, *Determination of the Appropriate Bargaining Unit by the NLRB: A Lack of Objectivity Perceived,* 8 B.C. IND. & COM. L. REV. 175, 176 (1967).

[54] 157 N.L.R.B. 679 (1966). *See also* Kaiser Co., 59 N.L.R.B. 547 (1944), in which the union, which represented 2,000 employees, alleged that the 1,000 newly hired personnel represented an accretion to the existing unit. The Board denied the unit clarification petition and ruled that the new employees were entitled to a representation election.

[55] 29 U.S.C. § 157 (1964).

[56] Remington Rand Div. of Sperry Rand, 132 N.L.R.B. 1093 (1961).

were an accretion to the existing unit. The Board held that because the disputed employees had been in existence since the original certification and the union had never requested representation rights, it waived its rights to gain representation by means of an accretion.[57] The proper procedure would be a section 9(c)(1) election.[58]

This so-called "waiver" or "estoppel doctrine" has been used infrequently, but effectively, to prevent a misuse of the unit clarification petition. In *Beaunit Fibers, Inc.*[59] the union's original certification covered all plant and maintenance personnel. In practice, however, bargaining was conducted on behalf of only those employees receiving hourly wages. In a unit clarification petition the union requested representation rights for the salaried plant and maintenance employees, but the Board held that the union's inaction constituted a waiver and dismissed the petition because a question of representation now existed.

The waiver doctrine is necessary to control the clarification procedure, but the determination of when it is applicable is a frustrating endeavor.[60] As with the equity docrine of laches, some flexibility is necessary, but it would be reasonable for Congress to require the Board to set forth basic guidelines to which interested parties may look.[61]

Traditionally the unit clarification petition has served a useful and desirable function.[62] Where the parties dispute a certain job classification, or where there is an alleged accretion to the existing bargaining unit, the clarification procedure has been valuable. It has provided the flexibility necessary in a dynamic employment relationship. But it is also clear that the unit clarification petition has the potential to distort and disrupt industrial relations. Used improperly, it could be a severe

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[57] *Id.*

[58] *See* Standard Oil Co., 146 N.L.R.B. 1189 (1964); General Elec. Co., 119 N.L.R.B. 1233 (1958).

[59] 153 N.L.R.B. 987 (1965); *cf.* FWD Corp., 131 N.L.R.B. 404 (1961), in which the employer and the union, throughout the 19-year bargaining history, had frequently changed the size of the unit. Finally the union petitioned for clarification of certain employees. The Board found that the unit represented by the petitioner was "too indeterminate" to permit resolving by motion for clarification the question of the disputed employees.

[60] *See* Westinghouse Elec. Corp., 173 N.L.R.B. No. 43, 1968-2 CCH NLRB Dec. 25,458 (1968).

[61] *See* Lufkin Foundry & Mach. Co., 174 N.L.R.B. No. 90, 70 L.R.R.M. 1262 (1969).

[62] Once it has been determined that the unit clarification is the proper procedure, the Board will issue an order designed to clarify the existing ambiguity. The question then is when the order will take effect. Because disputed employees may be covered by a particular collective bargaining agreement, and because the NLRB cannot, under § 8(d) of the NLRA, in most circumstances, force the parties to change the terms of a current agreement, the Board's order might not be effective until the termination date of the contract. However, in Smith Steel Workers, 174 N.L.R.B. No. 41 (1969), the Board split on other issues, but unanimously felt that a unit clarification order takes effect immediately, because it does not change or modify a current collective bargaining agreement, but corrects such a contract.

obstacle to the freedom of choice guaranteed to employees by the NLRA. The deciding factor is the impartiality and judgment exercised by the National Labor Relations Board. In the past, the limitations imposed on the use of the procedure have, to a large extent, been able to protect the rights of the employer, the labor organization and, most importantly, the employees. Recent developments, however, have given cause for great concern. As a veteran of the NLRB staff has stated: "The unit decisions consistently encourage the growth of unionism as such, *rather than protect the rights of employees.*" [63] The next section of this article examines these recent developments to determine the real extent of the truth of this comment.

V. The New Use of the Unit Clarification Procedure

A. *Libbey-Owens-Ford Glass Co.*[64]

Since its inception the unit clarification petition has been used only where there has been some change in the employment pattern. The creation of a new job classification, the movement of personnel, or the acquisition of a new plant have all involved some change which would clearly affect the delineation of the existing bargaining unit. Where, however, there has been no change in the employment pattern, the Board has found no need to clarify the bargaining unit. Unfortunately the decision in *Libbey-Owens-Ford* completely ignored these precedents.

There were ten company plants involved in *Libbey-Owens-Ford,* all of which were engaged in the production and fabrication of glass and glass products. Eight of these plants constituted one multiplant unit for which the United Glass and Ceramic Workers' Union was the certified representative.[65] The remaining two plants, one located at Brackenridge, Pennsylvania, and the other at Lathrop, California, were each separate bargaining units. Both of these units were also represented by the Glass Workers. The multiplant unit has been in existence since 1939, the Brackenbridge unit since 1943, and the Lathrop unit since 1962. Although certified as the representative for the multiplant unit, the union had only received voluntary recognition by the employer for the two single plant units. In 1961, before the Lathrop plant was

[63] K. McGuiness, The New Frontier NLRB 97 (1963) (emphasis added).

[64] 169 N.L.R.B. No. 2, 1968-1 CCH NLRB Dec. 29,001 (1968). This decision was reaffirmed and the election results certified in Libbey-Owens-Ford Glass Co., 173 N.L.R.B. No. 187, 1968-2 CCH NLRB Dec. 25,659 (1968).

[65] Employees who were responsible for glass cutting operations were represented in a separate unit by the Window Glass Cutters League of America.

in operation, the union requested inclusion of the employees at Lathrop in the multiplant unit. The company refused. Subsequently, a collective bargaining agreement recognized Lathrop as a separate bargaining unit. In the 1965 multiplant negotiations the Glass Workers demanded the inclusion of both Brackenridge and Lathrop in the bargaining unit. But the employer again refused the requested expansion, leaving the three units covered by separate collective bargaining contracts.

The union, unable to obtain its objectives through the process of good faith bargaining, filed a unit clarification petition asking the NLRB to consolidate the three units into one multiplant bargaining unit. The petition did not allege a dispute over job classifications, an accretion, or any other change from the previously existing employment pattern. Voting three-to-two,[66] the Board granted the clarification, ordering elections to be held in the single plant units to determine if the employees favored consolidation. Hoping to enjoin the election, Libbey-Owens-Ford filed a motion for summary judgment in the Federal District Court for the District of Columbia. In granting the motion,[67] the court concluded that: "[T]he National Labor Relations Board acted in excess of, and contrary to, the statutory authority conferred on it in the National Labor Relations Act." [68] The Board filed an appeal before the circuit court which, in a two-to-one decision, reversed the injunction on the grounds that the lower court lacked jurisdiction to entertain the motion.[69] The United States Supreme Court recently denied the employer's petition for certiorari.[70]

The NLRB decision in *Libbey-Owens-Ford Glass Co.* raises a number of important issues. The most prominent is whether the unit clarification can properly be used to consolidate existing bargaining units. The earliest Board decision involving this issue was *Chrysler Corp.*,[71] in which the United Automobile Workers filed a motion to consolidate three separate units. In granting the motion the Board relied on the fact that the parties treated the three units as one, that the terms of one contract applied to all units, and the extent of organization. Because the first two facts were not present in *Libbey-Owens-Ford,* and because the NLRB is barred from considering the

[66] Board members McCulloch, Brown and Zagoria were the majority, while members Fanning and Jenkins dissented.

[67] Libbey-Owens-Ford Glass Co. v. McCulloch, 57 CCH Lab. Cas. 21,172 (D. D.C. 1968).

[68] *Id.* at 21,176.

[69] McCulloch v. Libbey-Owens-Ford Glass Co., 403 F.2d 916 (D.C. Cir. 1968).

[70] 393 U.S. 1016 (1969).

[71] 42 N.L.R.B. 1145 (1942); *see* Western Union Tel. Co., 61 N.L.R.B. 110 (1945); West Virginia Pulp & Paper Co., 53 N.L.R.B. 814 (1943).

extent of organization as a controlling factor,[72] this early Board decision is clearly distinguishable from the instant case.

No prior NLRB decisions are directly on point. However, a similar situation existed in *St. Regis*,[73] a case decided by the NLRB Regional Director for the Sixth Region. The Pulp and Sulphite Workers filed a motion for unit clarification in which they sought consolidation of several separate units. The regional director properly denied the motion, concluding that:

> While the International's Motion is styled as one for unit clarification, it is apparent from the foregoing *that there is no dispute between the parties as to unit composition or unit description which would require clarification.* Rather, the dispute between the parties centers about the scope of the unit and thereby places in issue the basic appropriateness of five individual units . . . , as opposed to a single multi-plant unit. The International, by its Motion, is in effect requesting that a determination be made of a question concerning representation in a unit which it claims to be appropriate. The Board, however, has consistently held that the policies of the Act and of the Board require that such matters be determined through the filing of a petition in a representation proceeding.[74]

The Board did not discuss the *St. Regis* case in the *Libbey-Owens-Ford* decision. In the NLRB's brief before the court of appeals, however, it was argued that these two cases were distinguishable due to the fact that the units in the *St. Regis* case were represented by the various locals and not by the International Union.[75] Admittedly, this is a valid factual distinction. But the regional director's reasoning was based on the fact that there was no dispute concerning unit composition or description which would require clarification—a fact that was common to both cases.[76]

From the preceding discussion of the traditional use of the unit clarification, it is apparent that the Board developed the procedure to clarify a unit description which, because of a change in the employment pattern, had become ambiguous and was disputed. In *Libbey-Owens-Ford* there was no change in the employment pattern and no

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[72] *See* text accompanying note 7 *supra.*

[73] St. Regis Paper Co., No. 6-R-1193 (N.L.R.B. Director for 6th Region, 1967).

[74] *Id.* at 3-4 (emphasis added).

[75] Reply Brief for Appellant at 5, McCulloch v. Libbey-Owens-Ford Glass Co., 403 F.2d 916 (D.C. Cir. 1968).

[76] *St. Regis* is a weak precedent, having been decided by the regional director, rather than by the NLRB.

ambiguity or dispute over unit description. Impervious to these obvious facts, the Board still proceeded to "clarify" the units. In previous cases the Board strongly condemned such a misuse of the unit clarification petition. In *Bath Iron Works Corp.*,[77] for example, the company had two operating divisions, each separately represented by the same union. Subsequent to a merger of the divisions, the union filed a unit clarification petition requesting that the units be combined. The Board reasoned that:

> It is clear from the above that the changes in corporate reorganization have not effected such changes in the status of the employees as would require us to find that the two units have been merged. . . . For these reasons and because of the outstanding contracts, we conclude that the issues raised here are not properly to be resolved at this time in this type of proceeding.[78]

Considering the fact that there was no change in the status of the employees of the Libbey-Owens-Ford Glass Co. (there was not even the corporate reorganization which took place in *Bath Iron Works*) and that the outstanding contracts specifically recognized separate bargaining units, it is difficult to reconcile these cases. Instead of attempting to reconcile or distinguish them, the Board cited *Bath Iron Works* in support of their position.[79]

If we again examine the traditional application of the clarification procedure, another deviation from precedent in *Libbey-Owens-Ford* becomes apparent. The Glass and Ceramic Workers gained certification of the multiplant unit in 1939, and voluntary recognition in the single plant units in 1943 and 1962. During the organizational campaigns in the single plant unit, the union had the right to request a single multiplant bargaining unit. The filing of a section 9(c)(1) representation petition would have properly given the NLRB jurisdiction to determine the appropriate bargaining unit. However, the Glass Workers "slept on their rights." On the basis of prior Board decisions, the waiver doctrine should have prevented this so-called clarification.

Another form of estoppel has been used to prevent an employer, who had specifically recognized certain employees in a contract coverage clause, from using the unit clarification to exclude them at a later time.[80] In *Libbey-Owens-Ford,* the bargaining units had separate and distinct

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[77] Bath Iron Works Corp., 154 N.L.R.B. 1069 (1965).

[78] *Id.* at 1070-71.

[79] Libbey-Owens-Ford Glass Co., 169 N.L.R.B. No. 2, 1968-1 CCH NLRB Dec. 29,003 (1968).

[80] *See* Sangamo Elec. Co., 112 N.L.R.B. 1310 (1955).

contracts each containing a coverage clause applicable only to the respective unit. In other words, the union had specifically recognized and accepted the existence of three separate bargaining units. The majority opinion does not explain the reason that a union is able to escape from a contract that would estop the employer. It appears that the Board has disregarded precedent and ignored the intended and proper use of the clarification procedure. Whether or not it was wise to disregard precedent is, at best, questionable. It does seem, however, that the Board should have explained its action. Yet even a more basic question remains—does the Board have the statutory authority to use the unit clarification petition to consolidate units?

1. The Question of Authority

Counsel for Libbey-Owens-Ford argued that since it is admitted that no question of representation exists, the NLRB has no jurisdictional basis to determine the scope of the bargaining unit.[81] Hence, the Board has no statutory authority to reshape the unit by consolidation. The employer also argued that if section 9 is read as a whole, the word "case" in the provision in section 9(b) [82] means a case where a representation question exists. Lastly, the company argued that since subparagraph (5) of subsection (c) specifically limits the authority granted in section 9(b),[83] it is apparent that unit determinations are restricted to cases arising under section 9(c). Therefore, section 9(c)(1) limits the Board's authority to designate appropriate units to cases in which a question of representation exists.

Answering these arguments, the General Counsel for the Board stated that "the Act provides the Board with implied authority to entertain this kind of petition notwithstanding the absence of a question of representation . . . ." [84] He reasoned that since section 9(b) does not specifically limit unit determinations to cases involving a representation question, the Board has implied authority to decide purely unit disputes, "since changed circumstances can create unit disputes

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[81] Brief for Employer for Rehearing and Oral Argument at 6-9, Libbey-Owens-Ford Glass Co., 169 N.L.R.B. No. 2, 1968-1 CCH NLRB Dec. 29,001 (1968).

[82]
> The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit or subdivision thereof . . . .

29 U.S.C. § 159(b) (1964).

[83] § 9(c)(5) of the NLRA, *supra* note 44.

[84] Brief for Appellant at 12, McCulloch v. Libbey-Owens-Ford Glass Co., 403 F.2d 916 (D.C. Cir. 1968).

without at the same time raising new questions of representation." [85] Therefore, there must be a procedure to handle such situations. Unfortunately, the General Counsel neglected to illustrate any "changed circumstances" which would warrant Board intervention.

Unwilling to accept the employer's arguments, the majority of the NLRB stated:

> We find no merit in the Employer's position that the union was required to resort to a representation proceeding to resolve the issue. . . .
>
> If the overall 10-plant unit sought and the existing single-plant units are all presumptively appropriate, it is not a difficult matter for the Board to make available to the employees in each of the hitherto separately represented plants an opportunity to express their preferences in a secret ballot election between continued representation in their one-plant units, or addition to the multi-plant unit. And the current contracts for those separate plants interpose no bar to such separate self-determination elections because the purpose of this proceeding is not to affect existing contracts, *but to mark out the appropriate unit for future bargaining*. . . .
>
> We conclude from the above review of outstanding principles and the arguments herein that the Petitioner has adopted a procedure which would appear to encompass its desired relief. We are unable to perceive any reason why a further delay should be required where, as here, no question of the presumptive propriety of the employer-wide unit exists and *only the technical problems of bargaining history and employer opposition have prevented its establishment.*[86]

The reasoning of the majority circumvents the arguments presented by the employer, and the dissenting members are quick to point this out.

> [The majority] ignore the fact that the void they undertake to fill—"to mark out the appropriate unit for future bargaining" without affecting existing contracts and, obviously, without reference to a representation issue—is a statutory void. Authorization for this type of election is completely lacking under the Act. Representation is not in issue in this case. Unit scope is.[87]

Furthermore, the dissenters concluded, employer opposition is not a mere "technical problem," [88] but, rather, it is a factor to be considered seriously and the existence of such opposition does not "justify ration-

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[85] *Id.*

[86] Libbey-Owens-Ford Glass Co., 169 NLRB No. 2, 1968-1 CCH NLRB Dec. 29,003 (1968) (emphasis added).

[87] *Id.* at 29,005.

[88] *Id.* at 29,006.

alizing the existence of the requisite authority for solution by the employees." [89]

The decision in *Libbey-Owens-Ford* reveals another conflict between the Board members concerning the existence of a requisite statutory authority. In granting the Union's clarification petition, the Board ordered a secret ballot election be held in the two single plant units. They reasoned that the statute contains no prohibition against giving "some weight to employee preference." [90] On the contrary, they argued, Congress approved the use of such self-determination elections [91] as evidenced by section 9(b)'s requirement of offering professional and craft employees the right to such elections. The dissenters, however, took the view that "there simply is no present statutory authority for permitting employees to decide, in a representational vacuum, which contract unit they wish." [92] They first based their view on the fact that self-determination elections have only been used in connection with the selection of a bargaining representative which arises in a section 9(c)(1) representation proceeding. Second, they stated that the 1947 (Taft-Hartley) amendments to the Act, which allowed self-determination elections by professional and craft employees, were actually *limitations* imposed by Congress on the Board's power to define units. These Congressional limitations are further exemplified by section 9(e)(1) which requires a secret ballot election to determine whether a labor organization's authority to negotiate a union shop agreement should be rescinded.[93] The dissent concluded that "these statutory realities are ignored by the majority." [94] This is the same position taken by the dissent in the appellate court.

The Board's decision in *Libbey-Owens-Ford* is disturbing not only because it contravenes Congressional intent, but also because it limits, rather than expands, both the freedom of association and the adherence to free collective bargaining which the Act espouses. The United Glass Workers' interest in the larger unit stems from the natural desire of unions to insulate their position against rival unions. By means of

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[89] *Id.*

[90] *Id.* at 29,004.

[91] *See* Globe Mach. & Stamping Co., 3 N.L.R.B. 294 (1937).

[92] Libbey-Owens-Ford Co., 169 N.L.R.B. No. 2, 1968-1 CCH NLRB Dec. 29,001 (1968).

[93] In addition to the election authorized by § 9(c)(1) and § 9(e)(1), § 209 of the Taft-Hartley Act, 29 U.S.C. § 179 (1964), allows such an election in national emergency disputes to determine whether the employees wish to accept the final offer of settlement made by the employer.

[94] Libbey-Owens-Ford Co., 169 N.L.R.B. No. 2, 1968-1 CCH NLRB Dec. 29,001 (1968).

the unit clarification petition, the NLRB helped the Glass Workers repel the Teamsters, who had already made overtures to the employees in the Lathrop, California, plant and who may well have found a place on the ballot in a representative election. Thus, not only did the Board's novel procedure favor one union over another, but it effectively denied the employees their full rights to choose their representatives.

Moreover, far from giving the employees the "fullest freedom" (as the majority of the Board averred), this decision limited not only the freedom of the employees in the two single-unit plants, but those found in the multi-unit plants as well. It is logical to assume that the 8,237 employees in the multiplant unit would be as greatly affected by the consolidation as the 835 employees in the two single plant units, since an enlarged bargaining unit would increase the problem of changing bargaining representatives in future years. Yet the 8,237 employees had no voice in the election which determined whether two plants should be added to their bargaining unit.

This case involves yet another disturbing problem—the disruption and destruction of free collective bargaining. Beginning with the enactment of the Wagner Act in 1935,[95] Congress emphasized that the interests of the nation were best served by a system of free collective bargaining. An examination of the statutes and of the expressions of legislative intent [96] which accompany them indicate a Congressional purpose of minimizing government regulation. Under a system of free collective bargaining, government regulation must be aimed at facilitating the agreement-making process. "Thus, the determination of the appropriate bargaining unit . . . must be confined to encouraging settlement without outside intervention." [97]

The majority's decision in *Libbey-Owens-Ford* shows a disregard of our free collective bargaining system. In the 1961 multiplant contract negotiations, the union requested inclusion of the Lathrop, California plant (which did not begin operations until 1962) in the multiplant unit. The company refused the request, but, in turn, had to concede to other union demands. Subsequently, a separate contract which covered only the Lathrop plant was negotiated and was in effect at the time of the Board decision. During the next multiplant negotiations in 1965 the union again requested inclusion of the Lathrop plant and added an additional request for the Brackenridge plant as well.

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[95] Act of July 5, 1935, ch. 372, §§ 1-16, 49 Stat. 449-57, *as amended* 29 U.S.C. §§ 151-66 (1964).

[96] McCulloch v. Libbey-Owens-Ford Glass Co., 403 F.2d 916 (D.C. Cir. 1968). *See,* Daily Labor Report, June 12, 1968, at A-3.

[97] P. ABODEELY, COMPULSORY ARBITRATION AND THE NLRB 6, (U. Pa. Labor Relations and Public Policy Series Rep. No. 1, 1968).

The employer, again at the cost of conceding to other union demands, refused the consolidation. Finally, the union persuaded a majority of the NLRB to give them what they were unable to obtain through good faith collective bargaining.

The dissenters accurately concluded that the majority opinion in *Libbey-Owens-Ford* contravenes the basic policy of the National Labor Relations Act. Section 1 of the Act provides that the policy of the United States is "to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions . . . by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing . . . ." The effect of the majority's decision in *Libbey-Owens-Ford* was to provide the union with the economic power simultaneously to shut down two additional plants of the company by striking and, thus, to obstruct additionally the free flow of commerce. Moreover, the enlargement of the bargaining unit increased the scope of negotiations and with it the scope of potential dispute. By the constitution and by-laws of the United Glass Workers, any one wage committeeman can prevent acceptance of a collective bargaining agreement.[98] The consolidation of the units not only increased the size of the wage committee, but also provided each committee member with the power to impede, if not prevent, a settlement. This is scarcely appropriate for the furtherance of industrial peace.

The concept of collective bargaining—"of two powers seeking their respective goals in a free and open market" [99]—is a workable solution which depends on minimal external intervention. In October of 1968, Libbey-Owens-Ford began new multiplant negotiations with the union. The consolidation of units was again requested and the employer, wanting the union to concede on other demands, offered to merge the Lathrop plant. This offer, and the union's decision to accept it, were directed by the economic realities of the market place—realities that were ignored by the Board's decision in *Libbey-Owens-Ford.*

B. *Aftermath of* Libbey-Owens-Ford

The National Labor Relations Board decision in the *Libbey-Owens-Ford Glass Co.* case has provided the unions with an immensely powerful economic weapon. After using the threat of consolidation during collective bargaining to force the employer to make concessions, the union can petition the Board to merge the units. But the impact

[98] Brief for the Employer at 32, PPG Industries, Inc., Case No. 6-UC-8 (NLRB, filed Dec. 9, 1966).

[99] P. ABODEELY, *supra* note 97, at 6.

of the decision is also felt as early as the union's organizational campaigns.

> For example, a union decides to organize two plants of an employer. It is apparent to the organizer that the union has a better chance of winning at plant "A" than at plant "B". It therefore petitions for a single unit at plant "A" and after winning the election is certified on a single unit basis. Later when chances of success at plant "B" seems brighter, it petitions for an election at plant "B" on a single unit basis. It wins the election and is certified, again on a single-plant unit basis. It then petitions for clarification of the unit to include both plants. The process can continue *ad infinitum* as the union continues to "nibble away" at the employer. Such a procedure does not lead to industrial stability—it leads to chaos, confusion and conflict.[100]

Labor organizations, aware of the potential of the *Libbey-Owens-Ford* decision, have not hesitated to use it. The United Glass and Ceramic Workers, after its success against Libbey-Owens-Ford, filed a unit clarification petition against PPG Industries, Inc.[101] The petition sought to consolidate three single plant units with one multiplant unit. As in the earlier case, the union had attempted to obtain consolidation in every multiplant contract negotiation in the period from 1954-1966. The company, at the expense of conceding to other union demands, refused the requested expansion. Since the two cases may not be factually distinguished,[102] the NLRB may well grant the union's request.[103]

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[100] Brief for Employer at 48, PPG Industries, Inc., No. 6-UC-8 (N.L.R.B., filed Dec. 9, 1966).

[101] PPG Industries, Inc., No. 6-UC-8 (N.L.R.B., filed Dec. 9, 1966). On May 22, 1968, the Regional Director transferred the case to the Board without rendering an opinion.

[102] In the employer's brief it was alleged that: "The *Libbey-Owens-Ford* decision is distinguishable from the instant case since it did not involve the merger of separately certified bargaining units." Brief for Employer at 41. However, in view of the decision in Brotherhood of Locomotive Firemen, 145 N.L.R.B. 1521 (1964), it is questionable whether this argument would be accepted by the Board.

[103] During the March, 1969, multiplant negotiations, the union again demanded consolidation of the 3 single plant units with the multiplant unit. When the company refused this demand, the union then requested a 30 day differential between the termination date of the 4 bargaining contracts. After considerable negotiation, termination dates with a differential were agreed upon. In the memorandum of agreement, the company promised that if, prior to February 16, 1972, the court issued a final decision ordering consolidation and if the employees at each plant voted in an election to join the multiplant unit, all contracts would terminate on February 16, 1972. In return, it was agreed that should the NLRB render a decision unfavorable to the company, the union will take such action as may be necessary to make it possible for the company to appeal to the courts. *See* Memorandum of Agreement Between PPG Industries, Inc. and United Glass and Ceramic Workers of North America, AFL-CIO, Canadian Labour Congress, at 1, March 26, 1969.

Recently, the American Cyanamid Corporation has been confronted with a similar situation.[104] In 1962, 1966, and again in March of 1968, the union requested the merger of separate bargaining units. Upon the company's refusal, the union called for a strike. This proved unsuccessful, and the labor organization filed a unit clarification petition. In response, the employer filed a motion to dismiss and, alternatively, a motion to reschedule the case after the Board renders a decision in *PPG*. Although refusing the former, the Board did grant the latter motion. It is therefore possible that the *PPG* case will be used to redefine or possibly, overrule the *Libbey-Owens-Ford* decision. If *PPG* does not overrule *Libbey-Owens-Ford,* it is extremely doubtful that *American Cyanamid* would reverse it, since *American Cyanamid* is factually distinguishable from *Libbey-Owens-Ford* because the company there has no history of multiplant bargaining.

The latest case involving the unit clarification procedure was again initiated by the United Glass and Ceramic Workers.[105] The petitioner was the certified representative in a three-plant unit and in a separate, single plant unit consisting of employees of the American Saint Gobain Corporation. After unsuccessfully demanding unit consolidation during bargaining negotiations, the union filed the unit clarification petition, basing its arguments on the Board's decision in *Libbey-Owens-Ford.* The union's brief, submitted to the regional director, maintained that the present situation and the situation which existed in *Libbey-Owens-Ford* were "substantially on all fours on the facts." [106] The employer, after alleging the impropriety of the *Libbey-Owens-Ford* decision, attempted to distinguish the cases, by arguing that whereas the consolidation in *Libbey-Owens-Ford* would create an employer-wide bargaining unit, a presumptively appropriate unit under the Act, a merger here would not result in a similar unit.[107] The difference is explained by two facts—the company owned a fifth plant in which the workers were represented by other unions, and the Window Glass Cutter's League of America had representation rights for all glass cutters employed in the multiplant unit plants. It is interesting to note that the Glass Cutters filed a motion to intervene in the proceedings and were granted permission by the hearing officer over objections by the petitioner. Although the same union represented some of the glass

[104] American Cyanamid Corp., No. 2-UC-20 (N.L.R.B., filed July 16, 1968).

[105] American Saint Gobain Corp., No. 6-UC-23 (N.L.R.B., filed Sept. 11, 1968).

[106] Brief for Union at 24, American Saint Gobain Corp., No. 6-UC-23 (N.L.R.B., filed Sept. 11, 1968).

[107] Brief for Employer at 6-7, American Saint Gobain Corp., No. 6-UC-23 (N.L.R.B., filed Sept. 11, 1968).

cutter employees in the *Libbey-Owens-Ford* case, it did not attempt to intervene there.

The decisions in *American Cyanamid, PPG, American Saint Gobain,* and other cases [108] will determine the future of the unit clarification petition. The nature of the petition, the National Labor Relations Act, the system of free collective bargaining, and public policy all dictate that the Labor Board reverse its decision in *Libbey-Owens-Ford.* Barring a change in NLRB membership, this is not likely to occur.

VI. Conclusion

The unit clarification petition was developed as an instrument of flexibility which was demanded by the dynamics of the employment relationship and the goals of the NLRA. Where there is a disputed job classification or an allegation of an accretion, the clarification procedure provides an expedient and valuable means of resolution. But even where changes existed in the employment pattern, limitations and controls on the procedure were found to be necessary. Decisions like *General Box Co.*[109] and doctrines such as estoppel prevented the unit clarification petition from being misused by either or both parties. The early decisions of the Board showed an awareness of the potentially destructive effects of a procedure which might deny the employees their freedom of choice. The decision in *Libbey-Owens-Ford* ignores this without providing an explanation for such an abrupt reversal of policy.

It is difficult to imagine that a consolidation of previously existing, separate bargaining units was envisioned as a function of the clarification petition. Such a use constitutes a drastic and unwarranted change from the intended and traditional uses of the unit clarification petition. Moreover, "clarifying" units by consolidating them ignores the controls and limitations on the procedure which have always been recognized as necessary to prevent abuses. By substituting NLRB fiat for collective

[108] The United States Steel Corporation was recently involved in a unit clarification proceeding in which the Industrial Police Association requested consolidation of 4 separate single plant units. The Regional Director found that the representatives at each plant were separate and distinct labor organizations involved in a strictly jurisdictional dispute. He then concluded that:

> The issue thus presented is not concerned with who represents the employees in the certified units or whether existing single-plant units should be merged into a multiplant unit, but rather who will conduct contract negotiations on behalf of employees in the existing units. I find that such a question, which involves solely and in a peculiar fashion the internal affairs of the four certified unions, can best be resolved by the parties themselves and is not, under the circumstances, cognizable under the Board's amendment or clarification of unit procedures.

United States Steel Corp., 68 L.R.R.M. 1056 (N.L.R.B. Director for 6th Region (1968) (footnotes omitted).

[109] 82 N.L.R.B. 678 (1949).

bargaining, and by denying both employees and employers their rights under the Act, the *Libbey-Owens-Ford* decision contravenes public policy. In his bitter dissent, Judge Tamm of the United States Court of Appeals for the District of Columbia Circuit critically remarked:

> The case illustrates the consistent tendency of administrative agencies to assume and exercise by accretion powers not granted to them specifically or by necessary implication. Undoubtedly, in most instances, this grasping for non-authorized powers is motivated by a sincere desire to perform more effective and efficient functions. I believe that the courts must insist, however, that the administrative agencies confine their operations specifically to those fields of activity which are bounded by the statutes which create their authority and authorize their operations. If additional power or functions are essential to a proper discharge of an agency's responsibilities, those powers or functions should not be self-created but should be sought from the Congress.[110]

[110] McCulloch v. Libbey-Owens-Ford Glass Co., 403 F.2d 916, 918 (D.C. Cir. 1968) (dissenting opinion).